COASTAL STATES ENERGY CO.

IBLA 85-733 Decided October 18, 1988

Appeal from a decision of the Utah State Office, Bureau of Land Management, readjusting coal lease U-020305 following administrative review.

Affirmed in part, set aside in part, reversed in part, and remanded.

1. Coal Leases and Permits: Readjustment--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

In accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), it is error for BLM, in readjusting a coal lease for an active underground coal mine, to set a royalty rate of 8 percent for coal removed from such mine without first determining if conditions warrant a lower rate.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for appellant; John S. Kirkham, Esq., Salt Lake City, Utah, for Valley Camp of Utah, Inc.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

In Coastal States Energy Co., 81 IBLA 171 (1984), the Board affirmed in part, set aside in part, and remanded to the Utah State Office, Bureau of Land Management (BLM), a decision dated November 10, 1982, readjusting coal lease U-020305. On May 28, 1985, BLM issued a decision implementing the Board's decision. It is this "implementation decision" that is the focus of the present appeal by Coastal States Energy Co. (Coastal States). 1/

1/ A sublessee of lease U-020305, Valley Camp of Utah, Inc., has filed a petition to intervene in the instant appeal, contending that it will be adversely affected by BLM's implementation decision of May 28, 1985. Valley Camp alleges, inter alia, that it received a royalty deficiency determination from the Minerals Management Service (MMS), dated May 2, 1986, that provided Valley Camp its first indication that BLM had issued the implementation decision on review. Although Valley Camp states that it has not yet been officially notified of the terms of that decision, it is apparent from its pleadings that it has actual notice of these terms (Statement of reasons at ll, Sept. 18, 1986). An appeal from the MMS royalty deficiency determination has been filed by Valley Camp under docket number MMS 86-0291 MIN.

The issue posed by Valley Camp to the Board is whether the terms of lease U-020305 are effective against it, given that official notice of these terms was apparently never received. The MMS royalty deficiency

Appellant contends in general that BLM's implementation decision is not consistent with or exceeded the remand directives of the Board in Coastal States Energy Co., supra. Section 3 of lease U-020305 is the focus of appellant's first argument. That section, as originally set forth in BLM's February 22, 1982, Notice of Proposed Terms, required the lessee to engage in diligent development of the coal resources so that coal is actually produced in commercial quantities before June 1, 1986. The Board's decision of May 31, 1984, remanded section 3 to BLM so that it might be conformed to the newly promulgated 30 CFR 211.2(a)(14), which provided that the diligent development period would run from the date of readjustment for leases issued prior to the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. | 201 (1982). BLM's implementation decision deleted the June 1, 1986, deadline criticized by appellant and otherwise carried out the Board's remand directive. Appellant now objects that diligent development requirements have not been specifically set forth in the lease. As this requirement was not imposed by the Board's May 31, 1984, decision, we hold that no error is demonstrated in BLM's implementation decision.

[1] Section 6 of the implementation decision addresses production royalties. This topic has been the subject of litigation that requires BLM to revise this section. In Coastal States Energy Co., supra at 179, the Board held that BLM could properly impose upon appellant a production royalty of 8 percent of the value of coal produced at appellant's underground coal mine. Subsequently, the Court of Appeals for the Tenth Circuit, in a similar but unrelated case, held that it was error for the Department to automatically fix the readjusted royalty rate for under- ground coal at 8 percent because such act ignored pertinent regulations, specifically, 43 CFR 3473.3-2(a)(3). Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987). In accordance with this decision and the remand directive of the District Court of Utah, 2/ we set aside BLM's implementation decision insofar as it imposes an 8 percent royalty rate without a prior determination by BLM whether a lower rate is warranted.

As set forth in BLM's Notice of Proposed Terms, section 6 also required that "[p]roduction royalties shall be payable the final day of the month

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fn 1. (continued)
determination specifically states that such terms were effective May 1, 1982. Thus, the precise question that Valley Camp asks this Board to decide should be squarely at issue in its appeal to the MMS Director. Regulation 30 CFR 290.7 authorizes an appeal to this Board from the MMS decision to be rendered. Because the proper forum for resolution of the issue posed by Valley Camp is presently with MMS, Valley Camp's petition for intervention is denied. See Koniag, Inc. v. Andrus, 580 F.2d 601, 611 (D.C. Cir 1978). cert. denied, 99 S. Ct. 733 (1979).

2/ Appellant sought judicial review of Coastal States Energy Co., 81 IBLA 171 (1984), at approximately the same time as BLM issued its implementation decision. The District Court of Utah has recently issued its decision in this case, Coastal States Energy Co. v. Hodel, 85-C-06655 (D. Utah Mar. 2, 1988).

succeeding the calendar month in which coal is mined." Appellant had objected to this provision because it required payment of royalties on a monthly basis, as opposed to the prior quarterly basis, and calculated the value of coal for royalty purposes when mined, rather than when sold. The Board's decision of May 31, 1984, after noting that 30 CFR 211.63(f) fixed the value of coal for royalty purposes as the gross value at point of sale, directed BLM to reconcile this apparent inconsistency and clarify whether payments are to be made monthly. BLM's implementation decision did not vary the relevant portion of section 6 in any manner, causing appellant to state that BLM had apparently ignored the Board's remand directive. We find no error in BLM's action. The apparent inconsistency identified by the Board at 30 CFR 211.63(f) (now 43 CFR 3485.2(f)) is resolved at 30 CFR 211.63(g) (now 43 CFR 3485.2(g)). If coal is not sold but is instead added to inventory, 30 CFR 211.63(g) provides a method to calculate gross value at point of "sale." This regulation removes any need for the clarification sought by the Board as to whether royalty payments are to be made monthly. See also Coastal States Energy Co., 94 IBLA 352, 360 (1986); Kerr-McGee Coal Corp., 96 IBLA 280, 284 (1987); Ark Land Co., 97 IBLA 241, 247 (1987). Appellant's objection is, accordingly, denied.

Coastal States objects also to section 11 of its lease, dealing with logical mining units (LMU). As originally drafted, section 11 stated that the lease was automatically considered to be an LMU. The Board's decision of May 31, 1984, remanded this section to conform to a then-recent change in regulations. In particular, the Board noted that 43 CFR 3475.6 (1983) provided that the holder of a lease readjusted between May 7, 1976, and August 30, 1982, may request removal of the provision automatically desig- nating a lease as an LMU. "Appellant will have this option on remand," the Board concluded. 81 IBLA at 176 n.4. In its implementation decision, BLM has deleted the provision automatically designating a lease as an LMU, and section 11 now reads in relevant part: "Either upon approval by the lessor of the lessee's application or at the direction of the lessor, this lease shall become a LMU or part of a LMU, subject to the provisions set forth in the regulations." 3/ We find that BLM has deleted the provision that Coastal States objected to and that it has conformed section 11 to the relevant regulations. Appellant's arguments directed to section 11 are, accordingly, rejected.

Section 12(b) of the implementation decision is appellant's next target on appeal. As originally drafted, this provision stated that a lessee shall conduct operations so as to avoid or minimize damage to "any forage and timber growth on Federal or non-Federal lands in the vicinity of the leased lands." (Emphasis supplied.) The Board's decision of May 31, 1984, directed BLM to strike "the portion of section 12(b) of the readjusted lease which pertains to the protection of 'non-Federal lands'." 81 IBLA at 176. In its implementation decision, BLM has deleted not only the phrase "non-Federal lands," but also the succeeding phrase "in the vicinity of the

3/ These regulations provide that a lessee's consent to subject pre-FCLAA leases to various LMU requirements is necessary. 43 CFR Subpart 3487.

leased lands." We agree with appellant that this latter phrase should have been retained in the implementation decision and, accordingly, reverse BLM's decision in this regard and direct BLM to add the phrase "in the vicinity of the leased lands" at the conclusion of section 12(b)(1) in the implementation decision.

Cultural resources is the focus of sections 13 and 31 of BLM's Notice of Proposed Terms. The Board's decision of May 31, 1984, noted that section 13 and certain stipulations in section 31 (Nos. 5 and 6) were at best duplicative and at worst in apparent conflict in addressing who was to bear the cost of measures taken to protect cultural resources. That decision directed BLM to develop a "single, clear stipulation or set of stipulations" on this subject and to clarify the extent to which appellant's existing mining operations are affected by such stipulations. 81 IBLA at 177. By such direction, the Board sought to ensure that "mere acceptance of the lease does not constitute a violation thereof." Id. at 179. In its implementation decision, BLM addressed cultural resources in stipulation number 5 of section 30. This stipulation informs the lessee that "[b]efore undertaking activities that may disturb the surface of previously undisturbed leased lands" a cultural resource inventory may be required. No mention is made of measures to protect cultural resources or who is to pay for them. The apparent conflict on this subject has thus been removed, albeit at a loss of useful detail. Appellant's concern that its mere acceptance of lease U-020305 would constitute a violation of the cultural resource provisions has been addressed by restricting the scope of these requirements to previously undisturbed lands. Whether appellant's current mining permits allow disturbance of previously undisturbed lands, as appellant contends, is not demonstrated by the present record.

Section 25 of the implementation decision captioned "lessee's liability to lessor" consists of two paragraphs that, when set forth in BLM'S February 22, 1982, Notice of Proposed Terms, were accompanied by a third paragraph. Appellant objected to this third paragraph because it appeared to impose strict liability upon the lessee. As the Board's decision of May 31, 1984, directed BLM to revise section 25, BLM deleted this third paragraph in its entirety. Appellant continues to object to section 25 but provides no reasons for its position. Because the burden of demonstrating error in BLM's decision rests with appellant, we hold that appellant's unsupported objection to the provisions of section 25 is properly rejected.

The remainder of appellant's arguments address certain stipulations in section 30 of the implementation decision. In the Board's decision of May 31, 1984, the Board directed BLM to "clarify the extent to which appellant's existing mining operations are affected by the special stipulations and to ensure that mere acceptance of the lease does not constitute a violation thereof." 81 IBLA at 179.

A number of stipulations, specifically numbers 5, 6, 9, 10, and 13 of the implementation decision, have been altered to remove the possibility that acceptance of the lease constitutes a violation thereof. For example, stipulation number 10 no longer requires the lessee to secure baseline data

of surface resources prior to mining. This stipulation does, however, continue to require that baseline data be secured. Our review of the stipulations identified in the Board's May 31, 1984, decision reveals that BLM has satisfactorily eliminated the possibility that appellant will be in violation of the stipulations by mere acceptance of lease U-020305. Appellant's objection in this regard is, accordingly, denied.

The stipulations as presently set forth in section 30 of the implementation decision leave little doubt that appellant's mining operation is to be subject to such stipulations as of the effective date of lease readjustment. Although appellant contends that a number of stipulations could require a halt to current mining operations if not observed, appellant has not demonstrated that such halt would be contrary to applicable authority. We hold, therefore, that BLM has satisfactorily clarified the extent to which appellant's existing mining operation would be affected by the stipulations and that appellant's objections to these stipulations are properly denied. 4/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office is affirmed in part, set aside in part, reversed in part, and remanded to that Office for action consistent herewith.

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Franklin D. Arness
Administrative Judge

I concur:

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R. W. Mullen
Administrative Judge

4/ Appellant has, however, identified a likely typographical error ("subsistence") in stipulation number 13 of the implementation decision.